Filed 2/28/12 P. v. Thomas CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. KRISTOPHER THOMAS, Defendant and Appellant.	B229263 (Los Angeles County Super. Ct. No. TA108178)

APPEAL from a judgment of the Superior Court of Los Angeles County, Larry S. Knupp, Judge. Affirmed.

Koryn & Koryn and Daniel G. Koryn, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Mary Sanchez and Tasha G. Timbadia, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Kristofer Thomas was convicted by a jury of first degree murder. (Pen. Code, § 187, subd. (a).)[1] The jury also found that the defendant intentionally and personally discharged a firearm in the commission of murder, resulting in death (§ 12022.53, subds. (b), (c) and (d));[2] and that he committed the offense to benefit a criminal street gang. (§ 186.22, subd. (b)(1)(C).) The court sentenced defendant to 50 years to life in state prison, the sentence consisting of 25 years to life for murder, plus 25 years to life for the use of a firearm.[3] The court did not impose a sentence for the gang enhancement.

FACTUAL BACKGROUND

About noon on August 16, 2009, Charnae Bray and the victim, Dequawn Allen, were returning from a swap meet on 87th and Broadway Streets. Bray was wearing an orange hoodie and Allen had an orange bandana on.[4] They were walking on Broadway towards 89th Street when Bray saw the defendant approaching them. Bray wondered who he was since she had never seen him before. The defendant had on a white shirt, blue jeans and a hoodie.

Bray and Allen were walking by a party supply store when the defendant walked up to them and asked Allen where he was from. Allen said he was from 9-4 Hoover. The defendant replied "Oh, yeah, is that right" and pulled out a gun from his waistband. Allen and Bray started running away. As Bray was running,

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[1] All further statutory references are to the Penal Code.

[2] Section 12022.53 has been repealed effective December 31, 2011. A new version of the section became operative on January 1, 2012.

[3] The court also imposed various fines and assessments and also awarded custody credits.

[4] Orange is the color used by the Hoover gangs.

she heard five shots. She looked back and saw Allen on the ground; he had two holes in his chest. Bray ran inside the store and called 911.

A few days later, Bray identified the defendant as one of six men shown her by police detectives in a photographic "six-pack."

The coroner identified four gunshot wounds to Allen and gave the cause of death as multiple gunshot wounds.

Besides Bray, there were two eyewitnesses to the shooting who testified.

Alexis Mendoza was driving on Broadway when he saw Allen, who he thought was between 15 and 17 years old, and the defendant, older at 25 or 27, standing on the corner of 88th Place and Broadway. Both men were Black. They were facing each other at a distance of three feet. Mendoza continued on his way when he heard one gunshot. He made a series of turns and came back to 88th Place. He saw the defendant running; "[h]e looked like he was running for his life." A white car drove up fast and passed by Mendoza. Before Mendoza reached Broadway, he looked in his rearview mirror and saw the defendant jump into the white car. Mendoza drove on and saw Allen on the ground, crying.

Angela Echeverria was gardening in the front yard of her house on 88th Place when she heard about five or six gunshots. The shots were coming from the corner of Broadway and 88th Place. Echeverria went to the corner where she saw the defendant walking with big and swift steps toward her. She saw that the defendant's right hand was under his shirt, holding a gun.[5] The defendant crossed the street; a white car arrived and the defendant got in. The car drove off, but not before Echeverria had seen the last three numbers (643) on the license plate.

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[5] Echeverria equivocated at trial about the gun, stating she was not sure, but she had told the police after the shooting that she saw a gun. She appears to have been a reluctant witness. She refused to identify the defendant in court.

The white car was spotted later that day, at approximately 11:15 p.m., by Los Angeles Police Detective Michael Lavant, who had been assigned to the Allen murder. He was in the territory of the Main Street Mafia Crips and he and his partner were looking for the white car. Lavant stopped the car and noted that its license plate was 6EVL643. The driver of the car was Kenneth Gibson, who Lavant knew was a member of the Main Street Mafia Crips. Gibson was driving with a suspended license. The detectives impounded the car which was then examined for trace evidence. The defendant's fingerprints were found on a tequila box in the car.

The defendant was arrested at his home on August 28, 2009. It was determined by the police that a cell phone found on the defendant's person when arrested was used in the area of the Allen murder on the day of the murder.

Detective Patrick Flaherty, a gang expert, testified how someone becomes a member of a gang and that "putting in work" means committing crimes. When he was asked what happens if a gang member fails to put in work, the defense objected "on 352 grounds," that Flaherty's testimony "is essentially bad character evidence that is coming in." After argument, the court overruled the objection, concluding that the evidence was relevant and admissible and "more probative than prejudicial." The answer to the pending question was "[t]ypically they get disciplined."

Flaherty went on to testify, among other things, that one of the most effective ways to gain respect in a gang is to kill a member of a rival gang. Some of the hunts for members of rival gangs are highly organized. Black gangs will look for young Blacks between the ages of 12 and the late 30's. The murder was committed in the territory of the Hoover gang; at the time of the murder, the Hoover and Main Street Mafia Crips gangs were rivals. In Flaherty's opinion, Allen's murder was committed for the benefit of the Main Street Mafia Crips gang.

DISCUSSION

A. *The Court Did Not Err in Refusing to Excuse Juror No. 1*

The defendant contends that the court should have excused Juror No. 1 "because it is clear Juror No. 1 was too concerned with her personal safety to render a fair and unbiased verdict."

The matter of Juror No. 1 arose when the bailiff reported that the jurors had become concerned because some people outside the courtroom had been giving the jury "bad looks." After a short discussion between court and counsel about how to deal with this, a recess was taken. When the court reconvened, the court inquired of the jury whether there was someone who could speak about whatever the "security issues" were. Juror No. 1 spoke up, stating that "I guess I have been the designated spokesperson." This juror went on to state: "We've noticed that some of the audience that have been here on a regular basis -- in particular, when we were leaving yesterday, they were sizing us up, if you will, as we were exiting the court and it just made us uncomfortable. And we are just concerned about, you know, our safety."

The court decided that a solution would be to hold the audience in the courtroom for five minutes after the jury left. The very next thing the court said was not to hold this against the defendant "in any fashion." The court then reassured the jury that everything would be done to protect their safety. The court closed by stating "[w]e do not want you to take this unfortunate incident out in the hall in any way against Mr. Thomas because it is not his fault. It is not his doing." The jurors were queried whether they could continue to be fair and impartial, to which the collective response was in the affirmative.

The issue surfaced again three days later, on the 11th day of trial. Outside the presence of the rest of the jury, Juror No. 1 stated that, when leaving her home,

she saw a car that one of the witnesses drives proceeding in the opposite direction and then quickly pull into a parking lot. The juror thought this to be "odd." After the court asked Juror No. 1 what the juror expected the court to do, the juror suggested that someone could check and see in the parking lot whether the witnesses' car was the car that the juror had seen earlier on the street. The court rejected this, noting that there had been no threats and not even a cross look.

There now ensued a discussion that reflected the court's patience and tact in dealing with Juror No. 1's concerns. While Juror No. 1 spoke at some length, the gist of it appears to have been that some people were "sizing us up"; that a black Cadillac appeared three times outside the gated complex where she lived; and there was the matter of a witnesses' car that she thought had followed her. Nonetheless, Juror No. 1 affirmed twice that she could continue to be objective and impartial. Once Juror No. 1 had left the courtroom, the court stated that in its opinion "we have a hypersensitive juror" who perhaps has watched too much television and news; the worst the court had heard was some persons were sizing up the jury "whatever that means."

The defense requested that the court excuse Juror No. 1 because of her hypersensitivity and because of her "paranoia." The court did not excuse Juror No. 1 because she repeatedly stated that she could be fair and there was nothing to indicate that the jury should be escorted to and from the parking lot.

"[T]he jury is a 'fundamentally human' institution; the unavoidable fact that jurors bring diverse backgrounds, philosophies, and personalities into the jury room is both the strength and the weakness of the institution. [Citation.] '[T]he criminal justice system must not be rendered impotent in quest of an ever-elusive perfection. . . . [Jurors] are imbued with human frailties as well as virtues. If the system is to function at all, we must tolerate a certain amount of imperfection short of actual bias.'" (*In re Hamilton* (1999) 20 Cal.4th 273, 296.) "Juror misconduct

raises a presumption of prejudice, and unless the prevailing party rebuts the presumption by showing the misconduct was harmless, a new trial should be granted. [Citations.] This does not mean that every insignificant infraction of the rules by a juror calls for a new trial. Where the misconduct is of such trifling nature that it could not in the nature of things have prevented either party from having a fair trial, the verdict should not be set aside." (*Enyart v. City of Los Angeles* (1999) 76 Cal.App.4th 499, 507.)

Measured by the foregoing standard, the defendant's argument fails because there simply is no showing in the record that Juror No. 1's capacity to be fair and impartial was impaired. In fact, the only evidence that bears directly on this issue is that Juror No. 1 confirmed three times that she could remain impartial: once when the issue first surfaced and twice during the hearing that addressed her concerns. It is also true that the trial court cautioned the jury not to hold any of this against the defendant because none of it was his fault, a measure that tamped down the potentially damaging effect of the discussion about the jury's safety.

We do not agree with the defendant that Juror No. 1's concerns for her personal safety were "inflammatory." On the contrary, the record reflects a rather calm and steady attitude that appeared to focus on events that seemed more puzzling than alarming. There is nothing to show that the jury, including Juror No. 1, was unable to discharge its function fairly and impartially.

We review the court's decision not to excuse Juror No. 1 for an abuse of discretion and will affirm it, if it is supported by substantial evidence. (*People v. Cleveland* (2001) 25 Cal.4th 466, 474.) On the record before us, no abuse of discretion has been shown.

B. *The Gang Expert Evidence Was Properly Admitted*

The defendant contends that Detective Flaherty's testimony about "putting in work," i.e., his testimony about gangs, should have been excluded because it "was not relevant to the charge of killing Dequawn Allen."

"We have recognized that admission of evidence of a criminal defendant's gang membership creates a risk the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the offense charged. [Citations.] As defendant points out, evidence of a defendant's criminal disposition is inadmissible to prove he committed a specific criminal act. (Evid. Code, § 1101.) Moreover, even where gang membership is relevant, because it may have a highly inflammatory impact on the jury, trial courts should carefully scrutinize such evidence before admitting it. [Citation.] [¶] . . . As defendant acknowledges, in a gang-related case, gang evidence is admissible if relevant to motive or identity, so long as its probative value is not outweighed by its prejudicial effect." (*People v. Williams* (1997) 16 Cal.4th 153, 193.)

Just as in *People v. Williams*, *supra,* so also "[g]ang evidence in this case was relevant to both motive and identity." (16 Cal.4th at p. 193.) As the defendant points out, his defenses were to deny culpability, attack the credibility of the prosecution's case and misidentification. Motive and identity were squarely put at issue by these defenses.

As Bray testified, she had not seen the defendant before, and it is thus inferable that the defendant shot a total stranger four times at close range and did not even attempt to rob him. Given the sequence of events – that defendant asked Bray where he was from and Bray answered in effect, that he was a member of a rival gang, and the circumstance that he was in an area disputed between that gang and defendant's gang, and that defendant immediately pulled out a gun and shot Bray – the gang motive was evident and paramount.

Identity was also at issue, as the defendant himself acknowledges. Here too the evidence of gang membership on the part of the victim as well as the shooter, and the dynamics of gang warfare as explained by Flaherty, helped to show that it was indeed the defendant who killed Allen.

We recognize, of course, that gang evidence has to be carefully scrutinized and weighed as to its prejudicial effect. (*People v. Williams, supra,* 16 Cal.4th at p. 193.) With these principles in mind, it appears that this case approaches the paradigm of a case where gang evidence was properly admitted. It is *solely the gang evidence* that explains why this crime was committed, that provides the motive for the killing. There simply is no other reasonable explanation, and there was no error.

In light of the circumstance that we find no error in this record, it is unnecessary for us to address the defendant's further contention that the two alleged errors of which he complains also violated his federal constitutional right to a fair trial.

DISPOSITION

The judgment is affirmed.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.